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Supreme Court of the United States.

October Term, 1937.

No. 182.

A. Howard Myers et al.,
Individually and as the National Labor Relations Board,
Petitioners,

v.

Charles MacKenzie et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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v.

CHARLES MacKENZIE ET AL., *Respondents*.

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1. OPINIONS BELOW.

The opinion or memorandum of the District Court for the District of Massachusetts in this suit upon the granting of a preliminary injunction (R. 222, 117) is not reported. The opinion of the District Court upon the petitioners' motion to dismiss, which is not involved in this appeal, is reported in 15 F. Supp. 915 (R. 225, 118). The opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154. The opinion of the Circuit Court denying the petitioners' motion for leave to file a second petition for rehearing (R. 242) is not yet reported.

2. JURISDICTION.

The decree of the Circuit Court of Appeals was entered on February 12, 1937 (R. 232). A petition for rehearing by

the petitioners was denied on April 5, 1937 (R. 236), and a motion for leave to file a second petition for rehearing (R. 236) was denied on May 13, 1937 (R. 242). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

3. Question Presented.

The question presented to this Court by the petition for writ of certiorari in this case is whether the District Court violated any rule of equity or abused its discretion in granting the preliminary injunction, the granting of which was affirmed on appeal by the Circuit Court.

4. Statute Involved.

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U.S.C. Sup. II, title 29, secs. 151-166) is printed in the record (pp. 17-27 of pamphlet following R. 214). The rules and regulations made by the National Labor Relations Board are printed in the record (pp. 1-16, following R. 214).

5. Statement.

The statement of the various proceedings in this case set forth in detail in the petition for writ of certiorari will not be repeated. The allegations of fact made in the respondents' bill of complaint, as amended (R. 151), were found by the District Court to be true (R. 219, 111). These allegations will be set forth at some length in order that the facts in the case may be clearly presented to this Court.

The respondents are all employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant of that company in Quincy and Weymouth, Massachusetts.

The respondents are respectively Chairman, Vice-Chairman and Secretary of the General Body, a group elected by and from all of the employees under a plan for the representation of employees in that plant. The respondents bring this bill of complaint in their own behalf and in their capacities as officers of the General Body in behalf of all the employees in the Fore River Plant by the authority of a vote (R. 166) of the General Body of the Representation of Employees (R. 152, paragraph 2).

The respondents and approximately five thousand (5000) other persons are employed by the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant under oral contracts governing their rates of pay, wages, hours of employment and working conditions. These contracts were entered into and are to be performed entirely within Massachusetts (R. 155, paragraphs 8, 9). Their occupations are wholly intrastate activities and they are not engaged in interstate commerce (R. 162, paragraph 25) or in occupations which directly burden, obstruct or affect interstate commerce (R. 162, paragraph 26). The Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant, is engaged in designing and building vessels from raw materials. The vessels are delivered to the purchasers at the Fore River Plant (R. 155, 97).

Before the Representation of Employees Plan was adopted in 1923 there were frequent walk-outs and interruptions in employment in the Fore River Plant caused by controversies arising between the employees and the management of the Plant (R. 156, paragraph 11). Since the Representation of Employees Plan was adopted, in 1923, there has developed and there now exists harmonious relations between the employees and the management, which has resulted in continuous operation and steady employment in the Plant. Under the Representation of Employees Plan the employees nominate and elect representatives

from their number who constitute the General Body. The General Body negotiates with the management of the Bethlehem Shipbuilding Corporation, Ltd., on all questions concerning rates of pay, wages, hours of employment and working conditions. Ninety-six per cent (96%) of the employees eligible to vote participated in the last annual election. All employees eighteen (18) years of age or older who have been on the payroll for sixty (60) days prior to the election and who are not officials of the Bethlehem Shipbuilding Corporation, Ltd., or persons having the right to recommend the hiring and discharge of employees are eligible to vote (R. 155, 156, paragraphs 10, 11).

The respondents and the employees they represent are satisfied with their existing contracts of employment and desire to retain the Representation of Employees Plan now in existence without change (R. 158, paragraph 17). The holding of the proposed hearing by the National Labor Relations Board on the complaint charging the Bethehem Shipbuilding Corporation, Ltd., with unfair labor practices will discredit the Representation of Employees Plan and destroy its usefulness to the employees. This will deprive the employees of the right to negotiate by the method of their choice which has been proven by years of operation. The alteration of the Representation of Employees Plan will cause dissatisfaction and result in labor disturbances and upset production in the Plant. The Plant will close, depriving the respondents of their employment. The damage to the respondents will be irreparable (R. 159, paragraphs 18, 19, 20, 21).

6. Argument.

The question presented to this Court by the petition for writ of certiorari in this case is whether the District Court violated any rule of equity or abused its discretion

in granting the preliminary injunction. It is the contention of the respondents that the decree of the District Court granting the preliminary injunction was within its discretion and violated no rule of equity and was properly affirmed by the Circuit Court on appeal.

The District Court found the allegations of fact in the respondents' bill of complaint to be true, and granted a preliminary injunction. On appeal the Circuit Court affirmed the decree of the District Court and stated (R. 232):

> "It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions."

The contention of the respondents before the District Court and before the Circuit Court was that whether or not the National Labor Relations Act, *supra,* was within the power of Congress as applied to certain types of business it was not within the power of Congress under the Constitution when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant. The District Court expressed grave doubts as to the constitutionality of the Act in its opinion denying the petitioners' motion to dismiss (R. 118, at 134), but did not decide that question. The District Court decided that the National Labor Relations Act was beyond the powers of Congress when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd. Similarly the Circuit Court did not decide the question of the constitutionality of the Act, but expressed doubt as to its validity when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd. (R. 229, at 231).

Since the decision of the Circuit Court this Court has decided that the National Labor Relations Act is within the power of Congress when applied to certain types of business.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, No. 419, October Term, 1936.

National Labor Relations Board v. *Fruehauf Trailer Co.*, No. 420, October Term, 1936.

National Labor Relations Board v. *Friedman-Harry Marks Clothing Co.*, No. 422, October Term, 1936.

Associated Press v. *National Labor Relations Board*, No. 365, October Term, 1936.

There is, however, a limit to the constitutional application of the Act. In its opinion denying the petitioners' motion for leave to file a second petition for rehearing, the Circuit Court, after the decision of this Court upholding the validity of the Act, stated (R. 243):

> "It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate business involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Board* v. *Freuhauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations

Board to show that the business involved is probably within its jurisdiction. On the findings of the District Judge that fact is not established in the present case. We think the case should stand for final hearing in the District Court."

It therefore is apparent that the Circuit Court, in affirming the District Court, did so on the facts found by the District Court and on its opinion that the National Labor Relations Act did not have a constitutional application to the respondents and the Bethlehem Shipbuilding Corporation, Ltd.

In none of the decisions of the Circuit Courts has a case involving a bill of complaint brought by employees been decided since the decision of this Court in *National Labor Relations Act* v. *Jones & Laughlin Steel Corporation, supra.* In the cases involving employers where a preliminary injunction was dismissed by a Circuit Court after the constitutionality of the Act had been decided by this Court, it is apparent that the nature of the business has clearly been within the jurisdiction of the Act. In these cases the Circuit Courts have omitted any consideration of jurisdiction in equity and have rested their decisions on the Act being constitutional.

General Motors Corp. v. *Bajork,* 90 F. (2d) 248.
Wilson Co. v. *Gates,* 90 F. (2d) 247.
Beman v. *Bendix Products Co.,* 89 F. (2d) 661.
Pratt v. *Oberman,* 89 F. (2d) 786.
Lyons v. *Eagle Picher Mining Co.,* 90 F. (2d) 321.
Beman v. *Iowa Mfg. Co.,* 90 F. (2d) 249.
Bowen v. *James Vernor Co.,* 89 F. (2d) 968.

In the cases of *Bowen* v. *James Vernor Co.* and *Lyons* v. *Eagle Picher Mining Co., supra,* cited by the petitioners,

it is clear from the opinion that the companies involved were engaged in the same type of business as those in the cases in this Court of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* and *National Labor Relations Board* v. *Fruehauf Trailer Co., supra.* These cases do not decide the question involved in the case at bar. For this reason the decisions of the other Circuit Courts handed down since the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra,* on which the petitioners rely have no application to the case at bar. The District Court in this case did not base its decision on the ground that the Act was unconstitutional *in toto.*

The complaint issued by the National Labor Relations Board against the Bethlehem Shipbuilding Corporation, Ltd., in this case charged a violation of sec. 8 (2) of the National Labor Relations Act, *supra,* by dominating and interfering with the Representation of Employees. None of the cases decided by this Court involving the National Labor Relations Act, *supra,* has involved alleged violations of the particular section of the Act concerned in this case. For this reason the respondents contend the decided cases should not control the case at bar.

The respondents submit the National Labor Relations Act can have no valid application to them or to the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant. The District Court found as a fact that the Bethlehem Shipbuilding Corporation, Ltd., is engaged at Fore River in the fabrication of ships from raw materials and the completed vessels are delivered at the Plant to the purchaser. The decisions of this Court in *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), and *Schechter Corporation* v. *United States,* 295 U.S. 495 (1935), compel the conclusion that the National Labor Relations Board can have no jurisdiction over the relations between the respondents

and the Bethlehem Shipbuilding Corporation, Ltd., at Fore River.

The petitioners in their specification of errors urge that the damage alleged to be threatened in the respondents' bill of complaint is not the irreparable damage for which relief can be obtained in equity. The District Court found the alleged damage to be irreparable and this finding was affirmed by the Circuit Court (R. 230, 232). The respondents now have a method of bargaining with their employer which for a period of more than ten (10) years has proven its effectiveness. The strength of the Plan of Representation of Employees is not in the actual plan of the organization, but in its successful operation, which has inspired confidence in its fairness in both employees and employer. That confidence will inevitably be shaken by the action of the National Labor Relations Board in holding a hearing on a complaint which, although directed to the Bethlehem Shipbuilding Corporation, Ltd., is really an indictment that the Representation of Employees Plan is unfair. Whether that be true or not the respondents have a right to have the question of the jurisdiction of the National Labor Relations Board determined before any damage is done. There could be no redress for the respondents after the damage is done. The remedy provided by the National Labor Relations Act does not meet the injury threatened here.

The respondents have a right, guaranteed by the Constitution, to bargain freely with their employer. This is a property right.

Adair v. *United States,* 208 U.S. 161.

The petitioners threaten to interfere with this right and when action is taken under the National Labor Relations Act to injure this right of the respondents by applying the

Act to a situation beyond the power of Congress the District Court has jurisdiction under the general equity principles to prevent the threatened damage. This Court has affirmed the jurisdiction of a District Court to enjoin an illegal assessment of a valid tax.

Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498.

The District Court found irreparable damage was threatened and that the respondents had no remedy at law which was plain, adequate and complete. It properly issued a preliminary injunction.

Terrace v. *Thompson*; 263 U.S. 197.
Truax v. *Raich*, 239 U.S. 33.
Pierce v. *Society of Sisters*, 268 U.S. 510.
Euclid v. *Ambler Realty Co.*, 272 U.S. 365.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U.S. 229.
Rickert Rice Mills v. *Fontenot*, 297 U.S. 110.

It is clear from the decided cases that the issuance of a preliminary injunction is a matter within the sound discretion of the District Court. The granting of a preliminary injunction by the District Court will not be reversed on appeal unless it appears that the District Court abused its discretion or violated some rule of equity in its issuance. Particularly is this true where the balance of injury as between the parties favors the granting of the injunction.

Prendergast v. *New York Telephone Co.*, 262 U.S. 43, 50.
Meccanon, Ltd., v. *Wanamaker*, 253 U.S. 136, 141.
Rogers v. *Hill*, 289 U.S. 582, 587.

The Circuit Court in this case fou[redacted]rict Court had not abused its discretion or viola[redacted]f equity in granting the preliminary injunctio[redacted]

7. Conclusion.

For the reasons set out above the respondents submit that the petition for writ of certiorari in this case should be denied and the District Court should be permitted on a final hearing to determine whether the nature of the respondents' occupations and the business of the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant are such as to come within the legitimate exercise of the powers of the National Labor Relations Board under the decisions of this Court.

Respectfully submitted,

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